



USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: _____

U.S. Department of Justice

United States Attorney

Southern District of New York

66 Chambers Street, Third Floor
New York, New York 10007

April 18, 2008

BY FEDERAL EXPRESS

The Honorable Kenneth M. Karas
United States District Judge
United States Courthouse
300 Quarropas St., Room 533
White Plains, NY 10601

MEMO ENDORSED

Re: Cardenas, et al. v. Phelps Memorial Hosp. Ctr., 07-CIV-11145 (KMK)(GAY)

Dear Judge Karas:

This Office represents the defendants and third-party defendants Open Door Family Medical Center and Ossining Open Door (collectively, "Open Door") in the above-referenced Federal Tort Claims Act (the "FTCA") action, which was removed to this Court from New York state court on December 11, 2007. I write respectfully to (1) report on the outcome of recent discussions among the parties, (2) to enclose a proposed stipulation substituting the United States of America (the "Government") as the defendant and third-party defendant in this action, and (3) to seek leave to move to dismiss the claims asserted by plaintiffs Cardenas and Anguisaca (the "Individual Plaintiffs") against the Government for lack of subject matter jurisdiction.

On March 4, 2008, the United States of America (the "Government") filed a motion seeking to substitute the Government as the defendant and third-party defendant in the place of Open Door and to dismiss the claims asserted by plaintiffs Cardenas and Anguisaca (the "Individual Plaintiffs") against Open Door on the ground that the Individual Plaintiffs had failed to exhaust administrative remedies. The Court denied that motion without prejudice for failure to comply with the Your Honor's individual practices. I apologize for not having read Your Honor's individual practices more closely and regret any inconvenience I may have caused the Court.

In the interim, the Government and counsel for both the Individual Plaintiffs and Phelps Memorial Hospital Center ("Phelps") have discussed the possibility of reaching an agreement as to both the substitution issue and the dismissal issue. Subject to the Court's approval, the parties have agreed on the terms of a stipulation substituting the Government as the defendant and third-party defendant. I respectfully submit a copy of the proposed Stipulation to Substitute the United States as Defendant and Third-Party Defendant.

On the other hand, counsel for the Individual Plaintiffs has indicated that he intends to oppose any motion seeking the dismissal of the Individual Plaintiffs' claims

against Open Door based on, among other grounds, the doctrine of equitable tolling.¹ In light of that position, the Government respectfully requests leave of the Court to renew its motion seeking dismissal of the Individual Plaintiffs' claims against the Government pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because the Individual Plaintiffs have not complied with the administrative exhaustion requirement of the FTCA. If Your Honor grants the Government leave to file such a motion, the Government proposes the following briefing schedule:

| | |
|---------------------------------------|---|
| Government's opening brief due | 5 days after the date of Court's order |
| Individual Plaintiffs' opposition due | 26 days after the date of Court's order |
| Government's reply | 36 days after the date of Court's order |

I thank the Court for its consideration of the enclosed proposed stipulation and the Government's request for leave to file a motion to dismiss.

The Court will hold a pre-motion conference on May 30, 2008, at 2:00

SQ ORDERED

[Signature]
KENNETH M. KARAS U.S.D.J.

4/16/08

MICHAEL J. GARCIA
United States Attorney

By: *[Signature]*

LI YU

Assistant United States Attorney
86 Chambers Street, 3rd Floor
New York, New York 10007
Telephone: (212) 637-2734
Fax: (212) 637-2686

Enclosure.

cc: Rocco Conte, Esq. (By Federal Express)
O'Connor, McGuinness, Conte, Doyle & Oleson
One Barker Avenue, Suite 675
White Plains, NY 10601-1517
Counsel for Third-Party Plaintiff Phelps Memorial Hospital Center

James P. Fitzgerald, Esq. (By Federal Express)
Fitzgerald & Fitzgerald, P.C.
538 Riverdale Ave.
Yonkers, NY 10705
Counsel for Plaintiffs Cardenas and Anguisaca

¹ In the discussions I had with counsel for the Individual Plaintiffs, I noted that the FTCA's threshold requirement for a plaintiff to exhaust administrative remedies is analytically distinct from whether the claims are timely under the applicable statute of limitations. Notwithstanding those discussions, counsel for the Individual Plaintiffs has decided to oppose the Government's motion to dismiss.